



County of Yolo

Office of the County Counsel

625 COURT STREET, ROOM 201 WOODLAND, CALIFORNIA 95695 TELEPHONE: (530) 666-8172
DIRECT: (530) 666-8275
FACSIMILE: (530) 666-8279

ROBYN TRUITT DRIVON
COUNTY COUNSEL

Philip J. Pogledich, Senior Deputy

May 6, 2008

VIA FEDERAL EXPRESS

Chair Arne Simonsen and Members of the Commission
Delta Protection Commission
14215 River Road
P.O. Box 530
Walnut Grove, CA 95690

Re: Revised Old Sugar Mill Specific Plan—Land Use Policy 4

Dear Chair Simonsen and Members of the Commission:

The County of Yolo submits this letter to further address Land Use Policy 4 in the Land Use and Resource Management Plan ("Resource Management Plan"). In particular, this letter focuses on issues raised during the March 27, 2008 public hearing on the revised Old Sugar Mill Project.

During the March 27 hearing, a majority of the Commissioners determined Land Use Policy 4 to be ambiguous. The Commission thus directed its staff to provide additional written guidance regarding the meaning of Land Use Policy 4, particularly in light of Senate Bill 5 ("SB 5") in the 2007-08 session of the Legislature. This letter reiterates and expands upon the County's prior discussion of SB 5 and how it affects the revised Project.

As discussed below, SB 5 says very clearly that new housing in rural areas like Clarksburg can proceed if certain standards—all of which are incorporated into the revised Project—are satisfied. The County respectfully submits that the Commission has no legal authority to require more of the County than the Legislature elected to require in SB 5. Nothing in the Delta Protection Act or the Resource Management Plan would support such a result. In fact, the Delta Protection Act is *silent* on the specific rural housing and flood protection issues addressed in detail in SB 5. There is simply no legal basis for the Commission to subject housing in Clarksburg to a new, higher standard for flood protection than the Legislature incorporated in SB 5.

DISCUSSION

Land Use Policy 4 requires "new non-agricultural residential development, if needed, to be located within existing Primary Zone communities where support infrastructure and flood protection are already provided." For at least three years, Project opponents have distorted the meaning of Land Use Policy 4 for the apparent purpose of creating inconsistencies that, but for such creative efforts, would not exist. It thus falls to the

Commission to interpret Land Use Policy 4 in an appropriate manner. This process begins by understanding the legal context of Land Use Policy 4.

1. The Legal Context of Land Use Policy 4.

A. Senate Bill 5 and Related Flood Protection Laws, Regulations, and Ordinances.

SB 5 creates a foundation for future flood control improvement projects and related planning efforts. SB 5 does not require any immediate action by local governments or impose restrictions on development for some time. Over the near term, it instead calls for preparation of a “Central Valley Flood Protection Plan” by DWR by July 1, 2012. Other provisions of SB 5 establish higher standards of flood protection for future development projects in *urban* and *urbanizing* areas (defined as areas of at least 10,000 residents, or which will grow to 10,000 or more within the next 10 years). Those standards are tied to local implementation of the Flood Protection Plan some years from now, and they will not apply to *rural* areas like Clarksburg.

SB 5 thus did not create any new flood protection standards for development projects in Clarksburg or other rural areas. It did just the opposite. SB 5 expressly says that the flood protection standard for new development in rural special flood hazard areas is—just as it has been for decades—the “Federal Emergency Management Agency standard of flood protection.” And unlike other flood protection standards that will be phased in within urban and urbanizing areas beginning in 2012, SB 5 provides for the FEMA standard of flood protection to continue to govern new housing in rural floodplains even after 2012.

The reference to the “Federal Emergency Management Agency standard of flood protection” is a reference to the existing federal regulatory framework for construction in floodplains.¹ *The same regulatory framework is incorporated into Levees Policy 3 in the Resource Management Plan.* And as the Board of Supervisors explained in its findings for the revised Project (previously provided to the Commission, and included as **Exhibit B** hereto (“Findings”)):

This framework is reflected in the County’s Flood Damage Prevention ordinance. Like the State model ordinance and FEMA regulations on which it is based, the County ordinance mandates that any new residential units built in special flood hazard areas be elevated and otherwise constructed in accordance with certain established standards. . . . [¶] Altogether, SB 5 serves to reaffirm the applicability of the County’s Flood Damage Prevention Ordinance to development in special flood hazard areas—which could potentially include the Project site in the future. Regardless of whether the Project site is ever so designated, the revised Project now mandates “early implementation” of requirements in the County ordinance for residential construction. (Findings at p. 10.)

Altogether, in SB 5, the Legislature expressly preserved existing flood protection standards for development in rural areas like Clarksburg—the same standards set forth in FEMA regulations, the County’s Flood Damage Prevention Ordinance, and Land Use Policy 3 in the Resource Management Plan. The County has ensured that these standards will apply to all Project housing units *even if the Project site is not designated a special flood*

¹ Assemblywoman Wolk drafted a letter for the Assembly Journal that reiterates this interpretation. A copy of that letter is attached hereto as **Exhibit A**.

hazard area. Not because this is what SB 5 or other laws require, but because the County is committed to going a step further to ensure the safety of future residents.

B. The Delta Protection Act.

Unlike SB 5, the Delta Protection Act says nothing at all about flood protection standards that apply to new housing in the Primary Zone. It is silent on this topic.

Briefly, the focus of the Delta Protection Act is—as the Act twice states—to ensure the “long-term agricultural productivity, economic vitality, and ecological health” of the Delta.² Consistent with this purpose, the Act also affirms the importance of small towns like Clarksburg and states that “cities, towns, and settlements within the delta are of significant historical, cultural, and economic value and . . . their continued protection is important to the economic and cultural vitality of the region.”³ The Act also calls for the Commission, in carrying out its various duties, to “[a]ssure orderly, balanced conservation and development of delta land resources.”⁴

But the closest the Act comes to articulating flood protection standards—which is not very close at all—is to prohibit local general plan amendments that would “expose the public to increased flood hazard.” This language does not express a legislative intent to give the Commission independent power to establish minimum flood protection standards. Rather, it covers a different issue entirely. Building houses does not “expose the public to increased flood hazard” unless the houses affect the maintenance or improvement of flood protection infrastructure. *The Commission adopted written findings over a year ago that determine this is not the case with the Project.* (See Feb. 28, 2007 Findings at pp. 7-8 and 10.)

Levees Policy 3 in the Resource Management Plan is perhaps the best evidence that the Commission has not previously interpreted the Delta Protection Act as authorizing it to create new flood protection standards for development in Delta towns. Rather than creating new standards, Levees Policy 3 expressly references the same FEMA regulatory framework endorsed by the Legislature in SB 5. This is a further reason why the Commission should now refrain from interpreting Land Use Policy 4 in a manner directly at odds with Levees Policy 3, SB 5, and the Delta Protection Act.

Altogether, the Delta Protection Act was not a flood protection law when it was adopted, and it cannot be remade into a flood protection law today *except* by the Legislature. The Commission has to consider the language and purpose of the Delta Protection Act in applying Land Use Policy 4. Not as misinterpreted by Project opponents or Commission staff, but as actually written into law by the Legislature. The interpretation of Land Use Policy 4 must be faithful to these basic principles, and it should respect the unique role of SB 5 on the issue of flood protection standards for new housing.

C. The Resource Management Plan.

The Resource Management Plan, including Land Use Policy 4, cannot be interpreted to impose flood protection requirements for new housing because, as noted, nothing in the Delta Protection Act authorizes the Commission to regulate this subject. This is a basic principle of California law: to be valid, a regulation must

² Pub. Resources Code §§ 29707 and 29709(b).

³ Pub. Resources Code § 29708.

⁴ Pub. Resources Code § 29702(b).

be within the scope of the authority conferred by the Legislature, and it must also be reasonably necessary to effectuate the purpose of the statute.⁵

What the Resource Management Plan can do is restrict the location of new housing units to existing towns and ensure that such development does not unduly conflict with the integrity of nearby farms or the environment. And this is precisely what it does. Land Use Policy 4 is not an anomaly—it is part of the overall scheme in the Plan of directing development to appropriate areas such as established towns. It helps ensure that farmland or open space in the Primary Zone will not be converted to flood protection or other infrastructure for new housing. All of the Primary Zone towns enjoy some level of flood protection, and *uncertainties about the precise level of protection afforded were well known at the time Land Use Policy 4 was adopted*.⁶ Those uncertainties were addressed in Levees Policy 3, which incorporated the FEMA regulatory framework, *not* in Land Use Policy 4.

Presumably, if the Commission had intended to require a demonstrated level of existing flood protection prior to the approval of any new housing within Delta towns, it would have said so in the Plan. But it did not, and it *could not* because the Delta Protection Act did not give it such implied, far-reaching authority. Land Use Policy 4 should thus be interpreted in accord with these key precepts.

2. SB 5 is Controlling, and the Revised Project Goes Beyond What it Requires.

For the reasons described in Section 1, SB 5 is controlling with regard to flood protection standards for new housing in rural floodplains. It speaks very specifically to new housing in all floodplains, including housing in rural towns like Clarksburg. There can be no dispute that the revised Project meets or exceeds what SB 5 requires, even though SB 5 will not apply to the Project site until (and unless) it is designated a special flood hazard area after ongoing mapping efforts are complete.

Specifically, the revised Project requires all new housing to be built in accordance with the County's Flood Damage Prevention Ordinance. That ordinance incorporates the FEMA standard of flood protection referred to in SB 5. This means that all new housing will be elevated to one foot above the base elevation of a 100-year flood event, and that it will be constructed in accordance with the building standards contained in the Flood Damage Prevention Ordinance. As discussed, Levees Policy 3 mirrors these requirements. Additional details are provided in the Board's Findings on the Revised Project (see pages 8-9 in Exhibit B hereto).

But the revised Project also goes much further. The applicant has entered into a Development Agreement with the County that includes several obligations *not* included in SB 5. For example, no homes can be built until a geotechnical investigation of the Sacramento River levee is completed, either by a government agency or the applicant. If the geotechnical investigation indicates that the Sacramento River levee is unlikely to be

⁵ Gov Code § 11342.1 ("Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."); Gov. Code § 11342.2 ("Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.").

⁶ *E.g.*, Pub. Resources Code § 29704 ("... most of the existing levee systems are degraded and in need of restoration, improvement, and continuing management.").

recertified as providing at least 100-year flood protection, the applicant is required to prepare a Flood Protection Plan that: (a) describes the improvements needed to ensure that the levee provides a minimum 200-year flood protection; (b) includes cost estimates of the improvements needed to achieve levee certification; and (c) a financing plan that identifies potential local, state, and federal agency financing and participation. Also, the applicant must implement any feasible improvements prior to building any homes or building other occupied structures within the levee protection area.

At the very least, this work will jump start any future federal, state or local efforts to enhance flood protection for Clarksburg. This is a good thing, and the only criticism is that it is not enough. But it is more than any law requires and, most importantly, is more than Land Use Policy 4 could be interpreted to require.

3. The Need for New Housing Has Clearly Been Established.

In its Findings for the revised Project, the Board of Supervisors explained why 126 new housing units is a necessary and appropriate level of residential development for Clarksburg. That discussion appears at pages 5 through 8 of the Findings attached hereto as Exhibit B.

At various points, there has been some confusion about a statement in the Clarksburg General Plan calling for only 27 new housing units to be built in Clarksburg prior to 2020. This is only a small part of what the Clarksburg General Plan says about new housing. Importantly, it does not accurately reflect the discussion, guidelines, and policies appearing elsewhere in the document that *call for an adjustment of this figure during the planning of the Old Sugar Mill project*. For example:

- A table showing the “population holding capacity” of the town states: “The Clarksburg General Plan designates 20-30 acres of residential land use for Specific Plan Area A. The number of residential units *will be defined by the specific plan upon its adoption, and as a result, the total population holding capacity of the town area is expected to increase accordingly.*” (General Plan at p. 51)
- Policy H11 in the Housing Element for the Clarksburg General Plan states: “The adopted 1.8 percent growth rate for the town area, as applied to Specific Plan Area A, shall be reviewed during the preparation of the specific plan. *Based on the review of information regarding the development of the specific plan, the adopted 1.8 percent growth rate may be increased for Specific Plan Area A.* (General Plan at p. 53.)

The obvious reason for such an adjustment is that, as of the time of preparation of the Clarksburg General Plan, job creation data and other relevant information for the Project site was not available. That information was developed during the Specific Plan process over the next few years. And as shown in the Board’s Findings for the revised Project, job creation data and other considerations—not known as of 2001—played a central role in the Board’s determination that 126 new units is appropriate for the Project site. That determination was guided by the goal of achieving a balance between jobs and housing within the community. It is a common goal of all jurisdictions within the Sacramento Area Council of Governments (“SACOG”), and is a key part of the SACOG strategy to reduce traffic congestion and improve regional air quality (helping to reduce emissions that contribute to global warming). It is also central to the “smart growth” approach to land use planning for the same reasons.

In addition, the Commission should be aware that the 27-unit “projection” in the Clarksburg General Plan was simply borrowed from previous work—completed before adoption of the Clarksburg General Plan—by SACOG. In developing its growth rate figure, SACOG was not seeking to estimate “need,” but instead sought only to project the likely level of growth based on then-existing information. The Clarksburg General Plan was written to conform to this figure but, as noted above, it also repeatedly said that the “need” for housing would be considered during the specific plan process for the Old Sugar Mill site. It thus did not attempt to forecast the commercial and industrial potential of the Old Sugar Mill site, nor did it consider the resulting demand for increased housing. It should be given no weight in determining the “needed” number of housing units that—just as intended in the Clarksburg General Plan—the Board of Supervisors later determined in consultation with the Clarksburg community during the specific plan process for the Project.

Under California law, determinations of the need for new housing have long been left to local governments. There is no indication that this changed upon adoption of the Delta Protection Act. Accordingly, the Commission should afford considerable deference to the judgment of Board of Supervisors on the issue of how much housing is necessary and appropriate within the urban boundary of Clarksburg. The Board’s determination was based on information not available when the Clarksburg General Plan was drafted, and deserves far more weight than projections that the Clarksburg General Plan expressly said would be reconsidered during the specific plan process.

4. Nothing in the Delta Protection Act Supports a Moratorium on New Housing Entitlements in the Primary Zone.

The Commission may be contemplating an interpretation of Land Use Policy 4 that would require the Project applicant to repair some or all of the 36-miles of levees protecting Clarksburg before building any new housing units. No law—not SB 5, the Delta Protection Act, or federal flood protection regulations—presently authorizes the Commission to find that a project applicant must fix all or even some of the levees protecting a small Delta town in order to proceed. Only the Legislature has authority to take such a drastic step. It *did not* delegate this authority to the Commission in the Delta Protection Act. Absent a very clear delegation of such authority, the Commission should refrain from interpreting Land Use Policy 4 in a manner that effectively imposes a moratorium on all new housing entitlements in the Primary Zone.

It is also long past time for the Project opponents to recognize that, rather than ignoring flood protection and related concerns, the County tackled them head-on in planning this Project and recent revisions. These concerns were thoroughly covered in the discussion of such issues in the EIR and the Addendum thereto.⁷ And in approving the revised Project—as *Project opponents and Commission staff acknowledge*—the County assumed that the levees will be decertified and required all new homes to be built in accordance with elevation and construction standards that would apply in such a circumstance. It also obligated the Project applicant to

⁷ For example, at the March 27 hearing, the attorney for the Natural Resources Defense Council (“NRDC”) said that the County had “buried its head in the sand” regarding climate change. This is not true and is refuted by the discussion of climate change in the Addendum to the EIR. That discussion followed the analysis of the Sacramento Superior Court in *Natural Resources Defense Council v. Reclamation Board*, as the County has previously stated. To the extent that NRDC or Commission staff contend the County’s understanding of that decision is in error, the County strongly disagrees, except to note that the County learned after the March 27 hearing of the Commission that the decision was never adopted as “final” because, rather than challenging the decision, NRDC opted to settle with case after the decision was released for review.

pay for residential flood insurance for a limited period, to ensure completion of geotechnical surveys along the Sacramento River levee and related work prior to the construction of new homes, and to comply with various other measures that address flood protection and related concerns.

As noted, none of this is presently required by law. The County did it anyway. Accordingly, any suggestion that the County has ignored such issues is plainly untrue and not well taken in light of the significant time and resources invested by the County in an effort to revitalize the Clarksburg community.

5. The Commission Should Reconsider its Preliminary Decision on Consistency with Levees Policy 3.

During the March 27 meeting, the Commission voted that the revised Project inconsistent with Levees Policy 3, apparently finding that the revised Project will increase flood protection and cause an increase in “densities.” That decision is not final until the Commission adopts written findings, which will likely occur on May 22. Prior to adopting findings, the Commission has an opportunity to revisit its decision on Levees Policy 3. The County believes the Commission should do so.

The basic problem with apparent reasoning of the Commission majority is that the revised Project is not the intended target of Levees Policy 3. It does not make sense to interpret Levees Policy 3 to bar *all* new residential entitlements in Primary Zone towns. As the County has previously explained, Levees Policy 3 should instead be read to bar all new development—regardless of type—that is induced to locate in an area previously “off limits” following an increase in flood protection. (See Board Findings at pp. 15-16.) In other words, Levees Policy 3 appears intended to keep development out of sensitive agricultural or environmental areas where it does not belong even if flood protection concerns are resolved.

Such an interpretation would give Levees Policy 3 a meaning that is logical and consistent with the core purposes of the Delta Protection Act. Also, as explained above, Land Use Policy 4 clearly directs new housing to existing towns. Reading Levees Policy 3 to say that no new housing can be built in existing towns—even following an increase in flood protection for those towns—creates a clear conflict with Land Use Policy 4. The Commission should avoid this result by reconsidering Levees Policy 3 and arriving at an interpretation that renders it harmonious with Land Use Policy 4.

CONCLUSION

In conclusion, a proper interpretation of Land Use Policy 4 must be faithful to SB 5, the Delta Protection Act, and other provisions of the Resource Management Plan. A proper interpretation must also respect the meaning of every word in the policy, and not add to or take away from the words chosen years ago. Based on these principles, the meaning of Land Use Policy 4 is clear.

As Land Use Policy 4 says, new housing should be directed to small Delta towns like Clarksburg. Those towns, unlike some other parts of the Primary Zone, have flood protection and some degree of necessary support infrastructure already in place. Land Use Policy 4 does not require 100-year or greater flood protection before any new housing can be built within these small towns. No law presently requires such a level of protection even in dense urban areas. Accordingly, the standards specifically set forth in SB 5 and other authorities apply to the revised Project. And judged in light of this interpretation, the revised Project is consistent with Land Use Policy 4.

Chair Simonsen and Members of the Commission
May 6, 2008
Page 8 of 8

The County appreciates the Commission's consideration of the points raised herein, and respectfully requests that the revised Project be found consistent with Land Use Policy 4.

Very truly yours,

Robyn Truitt Drivon
County Counsel

A handwritten signature in black ink, appearing to read "P.J. Pogledich", written over the printed name.

Philip J. Pogledich
Senior Deputy County Counsel

Attachments

cc: Daniel L. Siegel, Esq.
Timothy Taron, Esq.

Exhibit A
Assembly Journal Letter

minimize additional reporting burdens through use of existing federal forms and data already submitted under existing California-specific reporting programs. The Department of Toxic Substances Control should make every effort to ensure that reporting requirements can be satisfied through submittal of a single reporting form, utilizing existing electronic reporting capacity to the maximum extent feasible.

If DTSC's actions in implementing this measure give rise to the concerns noted above, I will author legislation to resolve those issues.

Sincerely,

IRA RUSKIN, Assembly Member
Twenty-first District

Legislative Intent—Senate Bill No. 5

September 11, 2007

*Mr. Dotson Wilson
Chief Clerk, California State Assembly
State Capitol, Room 219
Sacramento, California*

Dear Mr. Wilson,

This letter is intended to explain the meaning of the term "Federal Emergency Management Agency standard of flood protection," as used in Senate Bill 5 (Machado).

This term refers to existing federal criteria for development in flood-prone areas. Such criteria include those set forth in the Flood Plain Management regulations promulgated by the Federal Emergency Management Agency, which appear in Title 44 of the Code of Federal Regulations, as amended. Many local jurisdictions have adopted ordinances that are based on the criteria set forth in these regulations. This regulatory framework is the "Federal Emergency Management Agency standard of flood protection" referenced in the legislation.

Please include this letter in the Assembly Daily Journal to explain the Assembly's intent with regard to the meaning of the term "Federal Emergency Management Agency standard of flood protection." I appreciate your attention to this matter.

Sincerely,

LOIS WOLK, Assembly Member
Eighth District

Legislative Intent—Assembly Bill No. 1130

September 11, 2007

*Mr. Dotson Wilson
Chief Clerk, California Assembly
Room 3196, State Capitol
Sacramento, California*

Dear Mr. Wilson: I would appreciate it if this letter would be printed in the Journal.

The purpose of this letter is to clarify the nature of the program that is being transferred from the state to local agencies by my bill AB 1130.

AB 1130 transfers implementation of the Above-ground Petroleum Storage Act (Health and Safety Code Chapter 6.67, (the Act)) from the State Water Resources Control Board to the Unified Program Agencies

Exhibit B
Yolo County Board of Supervisors
Findings on Revised Project (3/11/08)

**FINDINGS OF THE YOLO COUNTY BOARD OF SUPERVISORS
REGARDING THE OLD SUGAR MILL PROJECT, AS REVISED, AND
CONSISTENCY WITH THE LAND USE AND RESOURCE MANAGEMENT PLAN
AND DELTA PROTECTION ACT**

The purpose of these findings is to explain how the Old Sugar Mill Project (the “Project”), as revised on remand, is now consistent with the Land Use and Resource Management Plan (the “Resource Management Plan”) of the Delta Protection Commission and the Delta Protection Act.

The Commission previously found the original Project to be inconsistent with three policies in the Resource Management Plan: Land Use Policies 3 and 4, and Levees Policy 3. The Commission adopted written findings (the “Findings”) on February 22, 2007 to explain its decision with respect to these and other disputed policies. As set forth below, the Board finds that the revised Project responds to the concerns of the Commission and is fully consistent with the Resource Management Plan and the Delta Protection Act.

INTRODUCTION

The Old Sugar Mill property is an obsolete industrial site located within the urban limit line (town boundary) of Clarksburg. Like the original Project, the revised Project is intended to transform and revitalize the site with a mixed-use redevelopment project that includes agricultural processing facilities, commercial opportunities, new housing, and public parks and recreational facilities. Also like the original Project, the revised Project preserves the historic brick mill buildings for winery and related uses, and contemplates the construction of an additional 180,000 square feet of agricultural and industrial infrastructure. And finally, just as with the original Project, the revised Project does not convert any farmland or open space to urban uses.

The revised Project does, however, differ in some important ways from the original Project. Using the Findings of the Delta Protection Commission as a template, the County and the Project applicant have redesigned the Project to achieve three goals:

- (1) To fully protect all existing and reasonably foreseeable future uses of the adjacent vineyard;
- (2) To scale back the residential component of the Project to include 126 or fewer units in accordance with community desires, needs, and recommendations, as previously expressed by the Clarksburg General Plan Advisory Committee; and
- (3) To provide for “early implementation” of strong construction standards—including elevated living areas—that apply to residential construction in designated flood hazard areas.

The following sections describe specific changes to the Project that relate to these goals, and also explain how the achievement of these goals responds to the concerns of the Delta Protection Commission.

1.0 THE PROJECT IS CONSISTENT WITH LAND USE POLICY 3.

1.1. Introduction to Land Use Policy 3.

As noted, the revised Project is an infill redevelopment project located entirely on a site that has been developed for industrial uses since 1934. Despite this, the original Project included a 300-foot agricultural buffer—essentially, a portion of the site that is “off-limits” to new non-agricultural construction—to protect the adjacent vineyard. The placement of this buffer was of significant concern to the Delta Protection Commission in its review of the original Project. By an 8-7 vote, the Commission found the original buffer to be inconsistent with Land Use Policy 3 in the Resource Management Plan.

Land Use Policy 3 requires new urban development to include buffers to protect farmland. It states:

New residential, recreational, commercial, or industrial development shall ensure that appropriate buffer areas are provided by those proposing new development to prevent conflicts between any proposed land use and existing agricultural use. Buffers shall adequately protect [the] integrity of land for existing and future agricultural uses. Buffers may include berms and vegetation, as well as setbacks of 500 to 1,000 feet.

Buffers imposed in connection with Land Use Policy 3 must therefore satisfy two criteria. First, they must “prevent conflicts between any proposed land use and existing agricultural use.” Second, they must also “adequately protect integrity of land for existing and future agricultural uses.”

1.2. The Revised Buffer Prevents Conflicts Between the Project and Existing Agricultural Uses.

In its Findings on the original Project, the Commission did not question whether the 300-foot buffer set forth in Mitigation Measure 4.1.2a satisfied the first of these tests. Rather, the Commission appeared to accept the County’s position that the buffer prevented conflicts with existing agricultural uses.

This same is true now. The revised Project retains the 300-foot buffer, but it is now measured from the edge of the County’s right-of-way rather than the first row of vines on the vineyard property. This means that no portion of the buffer covers any farmland capable of cultivation. In this way, the revised buffer prevents any conflict between the Project and the ground application of regulated substances on the nearby vineyard. The buffer has effectively been relocated to the east (toward the Project site) by about 15 to 25 feet. No other potential conflicts with existing agricultural uses have been identified.

Accordingly, the expanded buffer complies with this aspect of Land Use Policy 3. All existing agricultural uses of the vineyard may continue without any impairment. The County Agricultural Commissioner has provided a written opinion that supports this conclusion (attached hereto). As his opinion also notes, the addition of a berm and hedgerow as part of the revised Project will make the buffer more attractive and create a visual screen that may reduce the likelihood of complaints about agricultural practices on the vineyard parcel.

1.3 The Revised Buffer Adequately Protects Integrity of the Vineyard Property for Future Agricultural Uses.

In considering the original Project, however, the Commission reached a different result regarding whether the buffer would adequately protect integrity of land for “future agricultural uses.” In particular, the Commission expressed concern that the neighboring vineyard may one day be replaced by another crop that would require aerial spraying. The Commission also criticized the placement of the 300-foot buffer—which, as noted above, was to be measured from the first row of vines—and found that such placement would leave a portion of the vineyard property unavailable for “future agricultural uses.”

The Board finds that moving the buffer is an appropriate response to the Commission’s concerns about future agricultural uses. The buffer now allows the vineyard to expand to the edge of the County right-of-way. It also ensures that if the vineyard expands, the Project will not interfere with the application of regulated substances historically used by the grower on the existing vineyard. In addition, the Agricultural Commissioner has confirmed that:

- Based on his experience and a conversation with the vineyard operator, the vineyard is likely to remain for many years;
- In 13 years of operation, the operator has not applied any regulated substances by air, and the operator has no plans to apply any regulated substances in the foreseeable future in a manner that would more than a 300-foot buffer;
- The revised buffer is fully protective of all existing and reasonably foreseeable future agricultural practices on the vineyard property; and
- The revised Project buffer adequately protects the integrity of the vineyard property for its eventual conversion, if necessary, to another crop.

Accordingly, the Board finds that the expanded buffer adequately protects the integrity of the nearby vineyard property for “future agricultural uses,” as contemplated by Land Use Policy 3. This conclusion is also consistent with the County General Plan, which requires buffers of up to 300 feet in width to ensure the protection of farmland.

1.4 Other Legal and Policy Considerations.

Briefly, the Board finds that there are also additional legal and policy factors that support this change to the Project on remand. These factors are not part of the Board’s finding that the expanded buffer complies with Land Use Policy 3. Rather, they are included simply to illustrate some of the practical difficulties associated with other possible means of addressing Land Use Policy 3.

First, the County’s authority to require an agricultural buffer is derived from its constitutional police power, which it must exercise in a manner that is reasonable, nondiscriminatory, and neither arbitrary nor capricious. The County may have no legal authority to impose a larger buffer (i.e., in excess of 300 feet) in the absence of any credible evidence that it would ever benefit the vineyard property. The County is aware of no such evidence.

Second, under the facts present here, a wider buffer would be unfair to the Project site owners. The main purpose of an agricultural buffer is to protect agricultural operations from conflicts with new urban development. This purpose is not served, however, where a buffer is imposed on the redevelopment of property that was converted to urban uses many decades ago. Nor is it served where a buffer is imposed in such a way that the property rights of an urban landowner are seriously curtailed without any current or foreseeable future benefit to adjacent farmland.

Third and finally, the Board notes that the Project buffer establishes protection for the vineyard that does not currently exist—thus enhancing its existing and future integrity for agricultural uses. About two-thirds of the acreage surrounding the vineyard is presently zoned for non-agricultural uses (primarily industrial and residential uses). Many of those properties have already developed to some degree, and if they are developed to their full potential in the future, materials requiring a 500-foot buffer could not be used on 74 percent of the vineyard property even if all construction followed established setback and other requirements. However, the revised 300-foot Project buffer that is described above provides assurance that, at least along the eastern edge of the vineyard parcel, all existing practices and foreseeable future practices are protected.

Accordingly, the Board finds that a wider buffer may be legally infeasible and in conflict with sound considerations of public policy. As revised, however, the Project buffer satisfies the goal of fully protecting all existing and reasonably foreseeable future uses of the adjacent vineyard, consistent with the Resource Management Plan.

2.0 THE PROJECT IS CONSISTENT WITH LAND USE POLICY 4.

Land Use Policy 4 requires “new non-agricultural residential development, if needed, to be located within existing Primary Zone communities where support infrastructure and flood protection are already provided.” Accordingly, the focus of this policy is the residential component of the Project.

The Findings of the Commission raise two key issues with respect to Policy 4. First, the Findings question whether the residential component of the Project is “needed,” and conclude that the County provided “insufficient evidence” of a need for 162 units in connection with the original Project. Second, citing a “state of uncertainty” regarding flood protection for the Project site and surrounding area, the Commission expressed concern with the potential safety of future Project residents.

As explained below, the Board finds that changes to the Project address the Commission’s concerns and also meet two of the goals that have guided the County on remand: (A) to scale back the residential component of the Project to include 126 or fewer units, in accordance with community desires, needs, and recommendations; and (B) to provide for “early implementation” of strong construction standards—including elevated living areas—that would otherwise apply to residential construction only if the levees protecting Clarksburg are decertified in the future.

2.1 The “Scaled Back” Residential Component is Consistent With Community Desires and Housing Needs.

The Board finds that the residential component of the Project—reduced from 162 to 123 total units—is needed for at least the following reasons:

2.1.1 Local citizens support up to 126 new residential units.

The Clarksburg General Plan area consists of about 35,000 acres, and includes the Town of Clarksburg and surrounding farmland. As of 2001, the population of this area was 1,373, with 947 residents living in units located outside of town. And currently, there are about 456 residential units outside of town and only 140 residential units in town.

After holding dozens of meeting to review the original Project, the Clarksburg General Plan Advisory Committee arrived at a consensus recommendation that the Project include up to 126 new residential units. The Board places considerable weight on this recommendation in considering the appropriate number of housing units for the Project. In addition, various Clarksburg residents have repeatedly testified that housing in town is difficult to come by. Clarksburg is a highly desirable community, and some have indicated that former residents, including their children, would likely move back to Clarksburg if reasonably-priced housing becomes available.

Consistent with the testimony of some Clarksburg-area residents, local housing opportunities appear scarce. As of February 28, 2008, the only homes listed for sale¹ in the Clarksburg General Plan area are:

¹ Based on a review of homes available on www.realtor.com and www.californiamoves.com.

Street Address	Price	Size of house	Size of parcel
Within Clarksburg:			
52981 Sacramento Street	\$539,000	1,668 sq ft	0.20 acre
Outside Clarksburg:			
33912 S. River Rd.	\$1.7 million	4,311 sq ft	27 acres
54250 S. River Rd.	\$998,000	3,744 sq ft	24 acres
38300 Jefferson Blvd.	\$770,000	3,100 sq ft	5 acres
37170 Jefferson Blvd.	\$685,000	1,850 sq ft	40 acres

These and other factors discussed in this section, together with the substantial number of new jobs created by the Project, support the conclusion that authorizing the construction of 123 new residential units is both necessary and appropriate.

2.1.2 New housing on the Project site may reduce the conversion of local farmland to “ranchettes.”

Since completion of the Clarksburg General Plan Update on December 13, 2001, building permits for 32 new single-family homes have been issued for lots within the 35,091-acre Clarksburg General Plan area. The following table, organized by parcel size, summarizes building permit data from January 2002 to the present:

APN	Size of house	Size of parcel
043-271-08*	2272 sq ft	.259 acre
044-080-09	2284 sq ft	.46 acre
043-230-54*	2274 sq ft	.54 acre
043-230-52*	3469 sq ft	1.0 acre
043-320-08*	3175 sq ft	1.01 acres
043-320-09*	3291 sq ft	1.02 acre
043-320-12*	3155 sq ft	1.1 acres
043-320-13*	3400 sq ft	1.1 acres
043-220-12	996 sq ft	1.23 acres
043-230-53*	2936 sq ft	2.17 acres
043-120-14	2781 sq ft	6.85 acres
043-120-14	2419 sq ft	6.85 acres
043-250-09	5407 sq ft	9 acres
044-060-37	840 sq ft	18.8 acres
043-260-37	2300 sq ft	21.60 acres
043-260-32	2180 sq ft	22.02 acres
043-060-34	2895 sq ft	25.7 acres
044-080-01	1253 sq ft	27.75 acres
043-200-16	3840 sq ft	30.03 acres
043-180-09	1152 sq ft	39.54 acres
043-220-27	3492 sq ft	49.18 acres
043-130-44	1848 sq ft	56.08 acres
043-130-48	2975 sq ft	57.22 acres
043-190-08	2373 sq ft	61.71 acres
043-190-08	2004 sq ft	61.71 acres

043-130-25	1996 sq ft	65 acres
044-130-25	3634 sq ft	65 acres
043-210-01	3818 sq ft	73.34 acres
044-100-05	5649 sq ft	94 acres
043-200-03	3585 sq ft	102.89 acres
043-110-18	2510 sq ft	133.8 acres
044-120-10	1350 sq ft	291.5 acres

*Indicates parcel is within the Clarksburg urban limit line (town boundary).

As this table shows, all but eight of the 32 building permits were issued for construction on farmland outside of the town. Put another way, 75 percent of new residential development in the Clarksburg General Plan area within the last six years has occurred outside of town. And of the 24 homes built outside of the town in the past six years, 10 have been built on “ranchette” parcels of between 5 and 40 acres, and another 8 were built on parcels of between 40 and 80 acres.

The Board finds that the housing opportunities provided by the Old Sugar Mill project could help reduce the current pace of “ranchette” and similar development of farmland in the Primary Zone. While some buyers may continue to seek large, rural parcels for individual reasons, the fact that more than half of the homes built outside of Clarksburg over the past six years are relatively modest in size (i.e., less than 2,500 square feet) indicates that residential units built in connection with the Project would otherwise meet the needs of local buyers.

This finding is also supported by the fact that most (i.e., six of eight) homes built *within* Clarksburg in the past six years exceed 2,500 square feet in size. The larger homes also tend to occupy larger lots of one acre or more. Large homes on large lots are unlikely to be affordable to many buyers. And as noted above, there are presently almost no moderately priced homes available for purchase in the Clarksburg area. In contrast, however, residential units built in connection with the Project will be smaller and located on smaller lots than many of the homes recently built in Clarksburg.² Also, many of the new units will be cottage or cluster units, discussed further below, which are “affordable by design.” Some units are also likely to be deed-restricted for affordable housing, although the applicant has expressed an interest in satisfying the Project’s affordable housing requirement by rehabilitating substandard homes elsewhere in Clarksburg.

For these reasons, the Board finds that new housing opportunities on the Project site may reduce the conversion of Primary Zone farmland to “ranchette” and similar development.

2.1.3 The Project will create nearly 600 new jobs.

At full build-out, the Project is expected to generate 596 new jobs. Based on the County average of 1.2 jobs per household, the Project will provide employment for 497 households. The 123 residential units that will be built as part of the Project will thus provide nearby housing opportunities for about 25 percent of Project employees. As discussed below, particularly because many of the residential units will be cluster, cottage, or deed-restricted units, the Board expects that they will be affordable to those earning at least the County median income of \$65,700 (for a family

² Overall, there will be about six residential units per acre in the Project. This means that the average lot size will be less than one-fifth (0.20) of an acre, with some variation between different housing types (i.e., single family homes, cottage units, and cluster units).

of four). Accordingly, the Board expects that individuals employed at the industrial, commercial, and other components of the Project will be able to purchase units built as part of the Specific Plan. Few other projects, in the County or elsewhere, create both a large number of jobs and affordable housing opportunities for those that fill them.

2.2 The “Early Implementation” of Elevated Housing and Stronger Construction Standards Helps Ensure the Safety of Project Residents.

Clarksburg and the Project site are protected by levees that are included in the Sacramento River Flood Control Project. The Project site is currently designated as having 500-year flood protection, and is not in a “special flood hazard area.” Despite this, the Board has consistently acknowledged that just like in many other locations throughout the Delta, there is uncertainty about the level of flood protection that these levees afford. This necessarily leads to concern about the safety of existing residents and future Project inhabitants.

As reflected in its Findings, the Delta Protection Commission shared this concern about public safety. The Findings also noted the existence of considerable regulatory uncertainty that, as of that time, made it unclear as to whether California law would soon change to further restrict or prohibit development in rural areas like Clarksburg. Each of these issues is addressed in turn.

2.2.1 The Revised Project Provides for Early Implementation of Standards Promulgated by FEMA and Other Authorities to Protect Public Safety.

Sufficient information does not exist to enable any agency with jurisdiction (i.e., FEMA or the Department of Water Resources) to determine whether the 500-year flood zone designation currently in place for the Project site should be revised. Despite this, the County took a conservative approach to flood protection issues in approving the original Project, and included a host of mitigation measures and Development Agreement provisions to ensure that the Project would not conflict with potential future improvements to local levees. The County also sought to protect future residents by requiring the elevation of homes by five feet in accordance with a consultant’s opinion of the maximum flood depths within 120 hours of a levee breach.

The Commission nonetheless found that even with the modest elevation of livable areas, building up to 162 new residential units on the Project site “reduces the level of public health and safety by increasing the number of people at risk of flooding and is inconsistent with Land Use Policy 4.”

The Board finds that the Project revisions, however, adequately address the Commission’s concerns about public health and safety by fully acknowledging potential flood risks. In addition to the reduction in units, discussed above, two changes are of particular importance:

- **Elevation of Living Areas.** The residential component of the Project is now subject to all of the same requirements—established by FEMA using its regulatory authority—that apply to residential construction in areas with less than 100-year flood protection. Such areas are referred to as “special flood hazard areas” under FEMA regulations and in the County Flood Damage Prevention Ordinance modeled on those regulations. The basic purpose of these regulations,

as discussed below, is to ensure that all livable areas in residential units will be above the level of a 100-year flood.

- **Stronger Construction Standards.** All new residential units are to be built in accordance with strong construction standards—also included in the County’s Flood Damage Prevention Ordinance—that help neutralize the effect of flood flows on buildings. Such standards require buildings to be “anchored” to prevent flotation or other movement during a flood event. Engineering calculations must show that the structure is designed to withstand lateral forces created by flood flows. They also require all construction materials and utility equipment to be resistant to flood damage, and all heating, plumbing, electrical and other systems are also to be designed or located in a manner that prevents water entry during a flood.

Together, these new measures ensure that if the Project site is redesignated a “special flood hazard area” in the future, all residential units will fully conform to the elevation and construction requirements set forth in FEMA regulations and the County’s Flood Damage Prevention Ordinance (and such additional requirements as may be required by law at the time of construction). The Board finds that these new measures thus respond to concerns expressed by the Delta Protection Commission by significantly reducing potential risks to public safety in accordance with established legal standards that apply to development in flood-prone areas.

Additional information and findings that support this conclusion are set forth in the discussion of Levees Policy 3, below, which also relates to flood protection and public safety issues.

2.2.2 Regulatory Uncertainty has Diminished, and the Revised Project Complies with All New Legislation.

Since the Commission’s remand, the State of California has adopted a comprehensive flood protection plan for the Central Valley (in Senate Bill 17 (“SB 17”)), of which the Delta is a critical part. SB 17 establishes a nine-member Central Valley Flood Protection Board, directs that Board to prepare and adopt a strategic flood protection plan for the Central Valley (the “Central Valley Flood Protection Plan”) by December 31, 2010, and empowers that Board to establish and maintain standards for levee construction, operation and maintenance, and to review flood protection plans adopted by local agencies.

Certain companion legislation, Senate Bill 5 (“SB 5”) requires local governments to adopt conforming amendments to their general plans within 24 months of adoption of the Central Valley Flood Protection Plan. They then have another twelve months to amend their zoning ordinances to conform to the Plan. And once those amendments are effective, higher standards of flood protection—generally, 200-year protection in “urban” or “urbanizing” areas—must either be achieved or in progress prior to the approval of specific projects or even building permits for residential dwellings.³

³ An area is “urban” if it contains a population of 10,000 persons. Included in the same category are so-called “urbanizing” areas, or places where the population is projected to reach 10,000 within ten years.

Development outside of urban or urbanizing areas must meet the “Federal Emergency Management Agency standard of flood protection,” which refers to the federal regulatory framework for construction in floodplains. Assemblywoman Wolk drafted a letter for the Assembly Journal that reiterates this interpretation. This framework is reflected in the County’s Flood Damage Prevention ordinance. Like the State model ordinance and FEMA regulations on which it is based, the County ordinance mandates that any new residential units built in special flood hazard areas be elevated and otherwise constructed in accordance with certain established standards. A related bill (AB 70) provides that a local agency that fails to make one of the required findings, and therefore “unreasonably approves” residential development in a flood-prone area, must share in the state’s liability in the event of a flood.

Altogether, SB 5 serves to reaffirm the applicability of the County’s Flood Damage Prevention Ordinance to development in special flood hazard areas—which could potentially include the Project site in the future. Regardless of whether the Project site is ever so designated, the revised Project now mandates “early implementation” of requirements in the County ordinance for residential construction. Those units will therefore be built in accordance with the strongest standards that apply to residential construction in flood hazard areas. This approach will protect future Project residents in the event of a flood and is an important change from the original Project, as the resulting elevation of living areas (discussed further below) will likely be substantially greater than the five feet provided for in the original approvals, and other construction standards designed to ensure safety will now apply.

The Board therefore finds that the Project is consistent with Land Use Policy 4, and that the changes to the Project meet the goal of providing for “early implementation” of strong construction standards—including elevated living areas—that would apply to residential construction if the levees protecting Clarksburg are decertified in the future. All reasonable steps have been taken to ensure that foreseeable regulatory changes are anticipated in the revised Project.

3.0 THE PROJECT IS CONSISTENT WITH LEVEES POLICY 3.

Like Land Use Policy 4, Levees Policy 3 reflects the need to regulate construction in special flood hazard areas in accordance with ordinances like the County's Flood Damage Prevention Ordinance, discussed above. In addition, however, Levees Policy 3 appears to state that increased flood protection should not serve as a catalyst for new development in the Primary Zone. It provides in full:

Through flood ordinances based on Flood Emergency Management Act model ordinances, developed by the International Conference of Building Officials and included in the Uniform Building Code, local governments shall carefully and prudently carry out their responsibilities to regulate new construction within flood hazard areas to protect public health, safety, and welfare. Increased flood protection shall not result in densities beyond those allowed under zoning and general plan designations in place on January 1, 1992, for lands in the Primary Zone.

In its Findings, the Delta Protection Commission emphasized three issues with regard to Levees Policy 3: (a) the County needs to more fully acknowledge potential flood risks and provide corresponding assurances of public safety, particularly for residents; (b) the project may require increased flood protection; and (c) proposed residential densities exceed those within the existing community and the standard density for this type of area elsewhere in the county.

With the exception of the third issue (densities), the discussion above regarding Land Use Policy 4 is also relevant to the Commission's concerns with respect to Levees Policy 3. Accordingly, that discussion is incorporated as if fully set forth in this section. Additional information and findings pertinent to issues (a) and (b) for Levees Policy 3 are also set forth below, followed by a discussion of the "densities" issue.

3.1 The Revised Project Accounts for Potential Flood Risks and Related Resident Safety Concerns by Providing for "Early Implementation" of Strong Construction Standards.

As previously discussed, the Project now includes 39 fewer residential units. Also as discussed, the County's Damage Prevention Ordinance—which is based on the model ordinances referred to in Levees Policy 3—will now apply to all residential construction, even though the Project site is currently not in a special flood hazard area.

Early implementation of these construction standards ensures compliance with the first part of Levees Policy 3, which is basically a statement of existing law with regard to development in special flood hazard areas. A key part of the County ordinance, as also discussed above, is the elevated housing requirement. That requirement and related construction standards are discussed in Mitigation Measure 4.7.7a, which has been substantially revised to read as follows:

Habitable areas of all residential units shall be constructed with the floor level one foot above the base flood elevation (BFE) consistent with the County Flood Damage Protection Ordinance. The BFE determined by FEMA at the time a residential building permit is issued shall govern, unless FEMA has not updated its BFE for this location by such time. In that circumstance, the best available information shall be

used by a registered professional engineer in determining the BFE, including but not limited to any relevant advisory base flood elevation and floodway data available from a state or federal agency, and the County shall consult with all such agencies (including FEMA and the California Department of Water Resources) prior to issuing building permits based on the BFE to ensure that it has been determined in an appropriate manner using the best available information. All other aspects of the design and construction of residential units shall be subject to review and approval by the County, and shall conform to the requirements of the County Flood Control Damage Prevention Ordinance and other applicable federal, state and local laws and regulations.

FEMA has not yet designated a BFE for the Project site, and it is unknown whether new flood maps for the Clarksburg area will incorporate flood depth calculations (as in Sacramento and Stockton). Previously MM 4.7.7a required the construction of residential units according to an interim level of elevation (between 3 and 5 feet) based on a “time inundation study” that calculated the likely extent of flooding within 120 hours of a levee breach. Now, in the event that an official BFE for the site is unavailable during construction, the applicant must establish the BFE according to the best available state and federal information. The County will accept this elevation only after consulting with FEMA and the California Department of Water Resources. (Current information for the Clarksburg area suggests a BFE of 20 feet (NGVD 29) or more, which would require elevation of living areas at least 9 feet above the existing grade.)

In addition, the County has revised the requirements relating to levee integrity studies and similar matters contained in the Development Agreement.⁴ As before, a permanent fifty-foot levee protection area will be maintained along the levee toe (greatly exceeding the existing federal standard of 10 feet). Also as before, no residential units may be constructed anywhere on the Project site until a determination of levee integrity has been made, and a flood protection plan prepared (if needed). As a component of the flood protection plan, the applicant must prepare a financing plan that identifies potential local, state and federal sources of funding to install all improvements needed to provide 200-year flood protection. The flood protection plan is required unless levee integrity is confirmed by a geotechnical evaluation or government study. No building permits may be issued for any occupied structure within 300 feet of the levee until the applicant completes the flood protection plan and implements all feasible recommendations. And finally, Project mitigation measures also provide that no construction can occur on portions of this 300-foot area that may be identified as necessary for future flood control improvements.

⁴ Specifically, provisions of the Development Agreement relating to future geotechnical investigations have been revised to include new consultation and best evidence requirements, which will apply to any geotechnical work conducted by the applicant. A geotechnical investigation of the Sacramento River levee is required before any homes can be built as part of the Project. If the geotechnical investigation indicates that the Sacramento River levee is unlikely to be recertified as providing at least 100-year flood protection, the applicant is required to prepare a Flood Protection Plan that: (a) describes the improvements needed to ensure that the levee provides a minimum 200-year flood protection; (b) includes cost estimates of the improvements needed to achieve levee certification; and (c) a financing plan that identifies potential local, state, and federal agency financing and participation. Also, the applicant must implement any feasible improvements prior to building any homes or building other occupied structures within the levee protection area.

3.2 As Revised, the Project Complies with the Second Part of Levees Policy 3 to the Extent it May Apply.

As noted above, the second part of Levees Policy 3 states: “Increased flood protection shall not result in densities beyond those allowed under zoning and general plan designations in place on January 1, 1992, for lands in the Primary Zone.” The Board makes two alternative findings with regard to this part of Levees Policy 3: (1) the Project is not subject to this provision, as it does not require “increased flood protection” for its implementation; and (2) if this provision does apply, the Project does not increase “densities” in any manner prohibited by Levees Policy 3.

3.2.1 The Project Does Not Require “Increased Flood Protection.”

As an initial matter, the second part of Levees Policy 3 does not appear to address situations where flood protection improvements may *follow* the construction of unrelated urban development projects. Rather, Levees Policy 3 is concerned with the *growth-inducing effect* of improved flood protection.

Despite this, in its Findings, the Delta Protection Commission concluded that the second part of Levees Policy 3 applies because “[t]here is substantial evidence that the project may require increased flood protection.” The supporting evidence cited in the Findings falls into three categories—regulatory uncertainty, the potential impact of natural occurrences such as climate change, and the Project applicant’s voluntary commitment to conduct geotechnical studies and (if necessary) fund the preparation of related improvement and financing plans.

The Board finds that since this conclusion was reached, circumstances have changed enough to support a reevaluation of this conclusion in connection with the revised Project:

- **Legislative and Regulatory Uncertainty Has Declined.** Importantly, some key evidence relied on by the Commission to support its conclusion included pending legislation (i.e., AB 5, 64, 70, 236, and 142; SB 5, 6, 17, and 59). As discussed above with respect to certain key legislation, however, the revised Project meets or exceeds all of the requirements of those bills that were approved and signed into law. And with regard to residential construction in rural areas protected by levees, SB 5 reaffirmed the application of existing regulatory standards—such as the County’s Flood Damage Prevention Ordinance. The Board thus finds that uncertainty arising from these matters has declined substantially since the Commission issued its Findings in February 2007.
- **In a Recent Lawsuit Decided in Favor of the State Reclamation Board, a Court Found that the Effects of Climate Change on Flood Protection in Particular Locations Cannot Yet be Studied in a Meaningful Way.** In *Natural Resources Defense Council v. Reclamation Board*, on April 30, 2007 the Sacramento Superior Court rejected the NRDC’s claim that the Reclamation Board (now the Central Valley Flood Protection Board) should have prepared additional environmental analysis under the California Environmental Quality Act (“CEQA”) regarding the impacts of climate change. Among other things, it

found that NRDC had failed to present new information as to the specific effects of climate change on the project site.

Similarly, the County examined climate change in an Addendum to the EIR prepared for the Project. It reviewed many documents discussing climate change, including documents that were published after the Commission's decision to remand the Project to the County. Like the Sacramento Superior Court, the County found no significant new information that would enable it to reach a meaningful conclusion as to how Clarksburg-area levees could be impacted by climate change. The Board finds that in the absence of such information, there is no basis for concluding that the Project will require increased flood protection for its implementation. And of course, the "early implementation" of strong construction standards also enhances public safety in the event of a levee failure during a flood event (regardless of the cause).

- **Changes to the Project Make Clear that it Does Not Depend on Increased Flood Protection.** In concluding the original Project "may require increased flood protection," the Commission also pointed to provisions of the Development Agreement that required the Project applicant to prepare a study and take other preliminary steps toward improving flood protection for the Clarksburg area. While the Project does not require increased flood protection—particularly in light of the elevated housing requirement—the County has consistently encouraged the applicant to contribute to efforts to determine the adequacy of existing flood protection for the Clarksburg area in connection with Project approval. The Board finds that the Development Agreement helps promote public health and safety by providing a means of obtaining such information at no public cost. Such information may expedite any future flood protection improvements that will benefit the entire town and surrounding area.

As revised, however, the Project does not depend on such improvements in order to proceed. Indeed, many of the changes to the Project instead assume that such improvements will not be built in the foreseeable future. This is the very reason for requiring the early implementation of construction standards applicable to designated flood hazard areas. The Board thus finds that the Project does not require increased flood protection, and that it has been revised to improve public safety even in the absence of future flood protection improvements.

Altogether, the Board finds that there is no sound basis for concluding that the Project will require increased flood protection. Legislative and regulatory uncertainty has declined, design and construction standards applicable to the Project have been strengthened, and no other substantial evidence of a Project-related need for increased flood protection exists. Accordingly, the prohibitory language of Levees Policy 3 does not apply.

3.2.2 As Revised, the Project Does Not Increase “Densities” in any Manner Prohibited by Levees Policy 3.

The Board recognizes that the Delta Protection Commission may decide not to revisit the conclusions discussed above in considering the revised Project. The Board has therefore considered Levees Policy 3 in evaluating the revised Project. It finds that the revised Project is consistent with language in Levees Policy 3 relating to density increases.

In pertinent part, that language states: “Increased flood protection shall not result in densities beyond those allowed under zoning and general plan designations in place on January 1, 1992, for lands in the Primary Zone.” The Board finds that the Project is consistent with this provision for the following reasons.

First, the Commission’s Findings explain that the term “densities” refers to residential uses only. The County objected to this portion of the Findings before adoption. It pointed out that the Commission did not endorse this conclusion during its hearing on the original Project, and reiterated that the term “densities” should instead be read to refer to all forms of urban development. Accordingly, while it acknowledges the Commission’s interpretation, the Board respectfully continues to interpret “densities” in a different manner.

A key reason to interpret “densities” broadly is to ensure that Levees Policy 3 is not applied in a way that allows other types of development—including industrial or commercial projects—to proceed following flood protection projects. A narrow interpretation of “densities” would leave Levees Policy 3 inapplicable to such projects, even though many of their potential impacts to the agricultural and natural resources of the Delta would equal or exceed the impacts of residential projects. Accordingly, a broad interpretation of “densities” is more protective of these resources, and thus more in harmony with the purposes of the Delta Protection Act, than the narrow interpretation included in the Findings without much prior debate by the Commission.

In addition, the Board also observes that the term “density” is often used in a manner that is synonymous with “intensity.” The County General Plan and the accompanying Environmental Impact Report contains numerous examples.⁵ So does a recommendation in the Resource Management Plan that appears to mirror the language of Levees Policy 3 (Levees Recommendation R-13, referring to “intensity and density of use”). The reference to “densities” in Levees Policy 3 should thus be read in context and with the primary goal of the Delta Protection Act foremost in mind—preventing significant urbanization *of any kind* in undeveloped parts of the Primary Zone.

⁵ For example, the following County General Plan policies appear to use the term “densities” in a broad manner that refers to all types of development: Land Use Policy 2 (referring to “density of land uses”); Safety and Seismic Safety Policy S 10 (referring to “building densities”); Circulation Policy 21 (referring to “densities of development”). Also, the Agricultural Element of the County General Plan utilizes the State Department of Conservation’s definition of “urban and built up land” as meaning: “Land occupied by structures with a building density of at least 1 unit to 1.5 acres, or approximately 6 structures to a 10-acre parcel. This land is used for residential, industrial, commercial, construction, institutional, public administration, railroad and other transportation yards, cemeteries, airports, golf courses, sanitary landfills, sewage treatment, water control structures, and other developed purposes.” Finally, the EIR for the County General Plan also uses “densities” at times in a broad manner—referring to “urban activity densities” (p. 71), “higher densities of development” (p. 72), and stating “urban areas will increase in densities” (p. 72).

A broad interpretation of “densities” effectively allows new urban development only in places slated for urban development as of January 1, 1992, when the Legislature began considering the Act in earnest. Other parts of the Primary Zone remain subject to this portion of Levees Policy 3, and thus off limits to non-agricultural development even if flood protection is increased. Read in this way, Levees Policy 3 will achieve its intended purpose by effectively preserving such areas for continued agricultural and compatible uses without unnecessarily closing the door on the redevelopment of land within existing Delta towns.

Second, even if “densities” is read to apply only to residential development, the Findings focused on whether the residential component of the Project was overly dense in comparison with existing residential areas of Clarksburg and other, similar projects in rural towns in the County. This is only superficially true with respect to Clarksburg: as of December 2001, the town included 132 residential units on about 145 acres of land. However, many established residential areas of town include quarter-acre or smaller lots, and the overall figures in the Clarksburg General Plan are skewed because they include homes on lots up to 10 acres or more. In fact, as of 2001, about 81 acres of the land developed and identified as “residential” in the Clarksburg General Plan was zoned for minimum parcel sizes of 1 (about 19 acres) or 10 acres (about 62 acres). These densities are similar to the densities of “ranchette” development that the County and the Delta Protection Commission have sought to discourage.

Accordingly, the “densities” of the residential component of the Project are consistent with some long established residential areas in Clarksburg. And of course, as noted above, the Clarksburg General Plan Advisory Committee supported 126 new residential units on the Project site. The County has also required more compact forms of development in recent project approvals in the towns of Esparto and Knights Landing. Three recent projects in those towns have included residential densities of about six units per net acre—similar to the revised Project, which has a density of 5.7 units per net acre. Under Land Use Policy 24 in the County General Plan, this has been considered *low density* residential development (up to six units/net acre) for many years.

Accordingly, the density of the residential component of the revised Project is in line with the densities of other residential projects approved by the County. It is also consistent with the patterns of development encouraged by the Clarksburg General Plan and the Resource Management Plan. The Board thus finds that Project “densities” are consistent with Levees Policy 3. With the application of the enhanced flood protection standards, and the significant reduction in the number of residential units allowed in the Project, Levees Policy 3 is satisfied.

CONCLUSION

For all of the reasons stated above, the Board finds that the Project has been revised in manner that ensures consistency with all provisions of the Resource Management Plan, including those three policies discussed in detail above. In addition, the Board finds that the Project is also consistent with the Delta Protection Act and provisions of the Yolo County General Plan that incorporate the Resource Management Plan.

Attachment (Statement of Rick Landon, County Agricultural Commissioner)